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PARLIAMENTARY REPORT

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FRANK CRANMER
Fellow, St Chad's College, Durham
Honorary Research Fellow, Centre for Law and Religion, Cardiff University

CHARITY LAW

The period under review began with a joint statement by the Office of the Scottish Charity Regulator and HM Revenue & Customs clarifying the requirement for definition clauses (defining the meaning of 'charitable', 'charitable purpose' or 'charity') in constitutions of bodies on the Scottish Charity Register that also wish to seek tax relief from HMRC, in order to establish an operational arrangement that would have a minimum impact on Scottish charities. The agreement was based on the premise that there is very little divergence between the concept of what is charitable under the terms of the Charities and Trustee Investment (Scotland) Act 2005 (asp 10) and what is charitable for the purposes of the Taxes Acts.[1]

As intimated in our previous report, the Charities Act 2006 (Commencement No. 3, Transitional Provisions and Savings) Order[2] was duly made in March 2008 and brought into force a series of provisions, including the new Charity Tribunal and the new power to remunerate trustees for providing non-trustee services to their charities.

The Charities Act 2006 (Commencement No. 4, Transitional Provisions and Savings) Order 2008[3] was made on 1 April. Its main provisions are:

i. To bring into effect the new statutory definition of 'charity', based on the list of charitable purposes in the 2006 Act;
ii. The removal of the presumption of public benefit for charities established for the advancement of education, the relief of poverty or the advancement of religion;

1 The full text of the HMRC/OSCR briefing note is available at <http://www.oscr.org.uk/NewsItem.aspx?ID=cfe0172f-1d66-43b0-baaf-b1fb71149079>, accessed 15 May 2008.
2 SI/2008/751, available at <http://www.opsi.gov.uk/si/si2008/uksi_20080751_en_1>, accessed 30 May 2008.
3 SI/2008/945, available at <http://www.opsi.gov.uk/si/si2008/uksi_20080945_en_1>, accessed 15 May 2008.

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iii. The requirement for charity trustees to have regard to the Charity Commission's guidance on public benefit when exercising powers or duties to which the guidance is relevant; and
iv. To commence the provisions of the 2006 Act relating to the preparation and scrutiny of charity group accounts and to clarify the whistle-blowing duties of auditors or independent examiners.

More generally, the Charity Commission is continuing to develop its guidance on public benefit. Of particular interest to students of law and religion was the publication by the Commission, at the end of February, of the consultation document *Public Benefit and the Advancement of Religion: draft supplementary guidance*, together with an analysis of the underlying case law.[4] It should be said that some of the analysis is not entirely uncontroversial, relying heavily as it does on the Commission's decision not to register the Church of Scientology as a charity.[5] The analysis also suggests a purposive approach to the interpretation of the definition of 'religion' in subsection 2(3), even though it is not entirely clear that there is any need to go behind the plain words of the statute. There is also a nagging concern in some quarters that the Commission is tending to look at public benefit in terms of outcomes rather than asking whether or not the objectives of the trust in question are charitable. Responses to the consultation were invited by 30 June.

In Ireland, the course of reform continued its stately progress. In Belfast, the Charities Bill (Northern Ireland)[6] had finished its scrutiny in the Committee for Social Development and, at the time of writing, was awaiting its consideration stage. At the instance of the Committee, the Executive had tabled an amendment to the definition of 'religion' in subsection 2(3)(a) to make it clear that 'religion' includes monotheism. The amended definition would read as follows:

(a) in paragraph (c) 'religion' includes –
(i) a religion which involves belief in one god or more than one god, and
(ii) any analogous philosophical belief (whether or not involving belief in a god).

4 The draft guidance is available at <http://www.charitycommission.gov.uk/Library/publicbenefit/pdfs/pbarsum.pdf> and the underlying analysis at <http://www.charitycommission.gov.uk/Library/publicbenefit/pdfs/pblawrr.pdf>, both accessed 15 May 2008.
5 *Decision of the Charity Commissioners for England and Wales made on 17th November 1999: application for registration as a charity by the Church of Scientology (England and Wales)*. It also fails to take account of the Strasbourg judgment in *Church of Scientology Moscow v Russia* [2007] ECtHR 5 April 2007 (Application No 18147/02).
6 Available at <http://www.niassembly.gov.uk/legislation/primary/2007/niabill9_07.htm>, accessed 16 May 2008.

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In Dublin, the Charities Bill reintroduced into *Dáil Éireann* in 2007 had been amended by the Select Committee on Arts, Sport, Tourism, Community, Rural and Gaeltacht Affairs and was awaiting report and final stages, following which it would be sent to the *Seanad*.[7]

CHURCH OF ENGLAND MARRIAGE MEASURE 2008

The rather curiously titled Church of England Marriage Measure 2008[8] received Royal Assent on 22 May. It widens eligibility to be married in a particular church (but not in a cathedral) by introducing the concept of 'qualifying connection': that the applicant claiming the connection was baptised in the parish (unless the baptism took place in a combined rite that included baptism and confirmation), is registered as having been confirmed in the parish, has normally lived there or has 'at any time' habitually attended public worship there for at least six months. A qualifying connection can also be established through a parent who has lived or worshipped within the parish for at least six months during the lifetime of the applicant or through a parent or grandparent who was married in that parish. The Measure will come into force on 1 October 2008.

CONSTITUTIONAL AFFAIRS

On 25 March 2008, the Government published its White Paper, *The Governance of Britain – Constitutional Renewal*[9] and a draft Constitutional Renewal Bill. In a statement introducing the White Paper on behalf of the Prime Minister, the Lord Chancellor, Jack Straw, said that the Government remained 'profoundly committed' to the establishment of the Church of England and that appointments to senior Church positions would continue to be made by Her Majesty on the advice of one of her ministers, 'usually the Prime Minister'.[10] He also expressed the Government's gratitude to the General Synod of the Church of England for its proposals on how new appointments procedures should work and said that the Government was discussing future long-term arrangements with the Church.

Perhaps the most interesting feature of the exchanges was Straw's reply to a question from a Scots Labour MP, Jim Devine, about the future of the Act of Settlement 1700/01.[11] Readers may recall that there have been various attempts in

7 The amended Bill is available at <http://www.oireachtas.ie/documents/bills28/bills/2007/3107/B3107D-DC.pdf>, accessed 15 May 2008.
8 2008 no. 1, available at <http://www.opsi.gov.uk/uk-church-measures/2008/pdf/ukcm_20080001_en.pdf>, accessed 27 May 2008.
9 Cm 7342-I, II & III.
10 HC Deb (2007–08) 25 Mar 2008 c 23.
11 12 & 13 Will 3 c 2. Neither the Act of Settlement nor the Bill of Rights was given a citation date by the Short Titles Act 1896. The first is c 2 of the statutes passed in the session of Parliament that ran from

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recent years to raise the question of reforming or repealing that Act, most recently by Lord Forsyth of Drumlean in 1999, by Kevin McNamara MP in 2001[12] and by Lord Dubs in December 2004;[13] but the Government has always said that it has no such plans. During the debate on Lord Dubs' Bill the then Lord Chancellor, Lord Falconer of Thoroton, described the necessary changes in the law as 'complex and controversial' and said that they would raise major constitutional issues involving the amendment or repeal of a number of statutes: he cited eight, ranging from the Bill of Rights 1688/89 (1 Will & Mar sess 2 c 2) to the Regency Act 1937 (1 Edw VIII & 1 Geo VI c 1). Moreover:

> I should make it clear that this Government stand firmly against discrimination in all its forms, including discrimination against Catholics, and will continue to do so. The Government would never support discrimination against Catholics, or indeed any others, on the grounds of religion. The terms of the Act are discriminatory, but we should be clear that for all practical purposes, its effects are limited ... There is a difference between applying new legislation such as the Human Rights Act to existing legislation, and altering legislation which is part of the backbone of our constitutional arrangements. Indeed, this legislation is interwoven within the very fabric of the constitution and has evolved over centuries. *It is not a simple matter that can be tinkered with lightly.*[14]

On the other hand, Straw's answer to Devine seemed to indicate that there had been at least a slight shift in Government thinking about the inviolability of the Act:

> Let me say ... that I speak on behalf of the Prime Minister: because of the position that Her Majesty occupies as head of the Anglican Church, this is a rather more complicated matter than might be anticipated. We are certainly ready to consider it, and I fully understand that my Honourable Friend, many on both sides of the House and thousands outside it, see that provision as antiquated.[15]

6 February 1700 to 24 June 1701; some authorities cite it as 1700, others as 1701. Similarly, 'modern practice frequently refers to the Bill of Rights as made in 1689, though by its own terms it was made in February 1688': Lord Hailsham of St Marylebone (ed.), 'Constitutional law and human rights', in *Halsbury's Laws of England* vol 8 (2), (4th edition, London), p 44, para 35, n 3.

12 On 19 December 2001, McNamara was given leave by 170 votes to 32 to introduce a Treason Felony, Act of Settlement and Parliamentary Oath Bill but his Bill made no further progress beyond its introduction: HC Deb (2001–02) 19 December 2001 cc 319–323. There have also been various attempts to permit the monarch to be married to a Roman Catholic.

13 Succession to the Crown Bill (HL Bill 11 of 2004–05).

14 HL Deb (2004–05) 14 January 2005 cc 510–511, emphasis added.

15 HC Deb (2007–08) 25 March 2008 c 25.

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Two days later, however, in the No 10 morning press briefing, the Prime Minister's spokesman seemed to dismiss the idea that any kind of reform was possible, since

> to bring about changes to the law on succession would be a very complex undertaking; it would involve the amendment or appeal [*sic*] of a number of items of related legislation, but it would also require the consent of legislators of member nations of the Commonwealth.[16]

So that looks like a 'no', then – at least for the moment.

CRIMINAL JUSTICE AND IMMIGRATION ACT 2008

The Criminal Justice and Immigration Act 2008 (c 4) was given Royal Assent on 8 May. Inter alia, the Act introduces a new criminal offence of incitement to hatred on grounds of sexual orientation (section 74 and schedule 16) and abolishes the common law offences of blasphemy and blasphemous libel (section 79).

The new provisions on hatred on grounds of sexual orientation operate by inserting a new Part 3A into the Public Order Act 1986 (hatred against persons on religious grounds). However, as a result of a stand-off between Lords and Commons during the very last stages of the Bill, a saving has been inserted as follows:

> After section 29J insert –
> '**29JA Protection of freedom of expression (sexual orientation)**
> In this Part, for the avoidance of doubt, the discussion or criticism of sexual conduct or practices or the urging of persons to refrain from or modify such conduct or practices shall not be taken of itself to be threatening or intended to stir up hatred.'

The new offence of incitement to hatred on grounds of sexual orientation came into effect immediately.[17] The abolition of blasphemy and blasphemous libel took effect two months after Royal Assent.

DRAFT HERITAGE PROTECTION BILL

On 2 April 2008, the Department of Culture, Media and Sport published the draft Heritage Protection Bill.[18] Of particular interest to churches in England

16 See 'Downing Street press briefings: morning press briefing from 27 March 2008', available at <http://www.number-10.gov.uk/output/Page15147.asp>, accessed 27 May 2008.

17 For a full discussion of these provisions, see Ian Leigh, 'Hatred, sexual orientation, free speech and religious liberty' in this issue, pp 337–344.

18 Cm 7349, available at <http://www.official-documents.gov.uk/document/cm73/7349/7349.pdf>, accessed 30 May 2008.

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and Wales that benefit from ecclesiastical exemption are plans to create a single designation system, the Heritage Register, which will replace the existing systems of listing, scheduling and registering, with listed building consent and scheduled monument consent being replaced by a new Heritage Asset Consent and conservation area consent being merged with planning permission.

It is this last proposal that is causing concern to the Church of England in particular. The rather perverse effect of the proposals is that, although it will still be possible to close and demolish a listed church within a conservation area after having gone through the procedures laid down in the Pastoral Measure 1983, it will no longer be possible to demolish an *unlisted* church within a conservation area without the agreement of the planning authority.

GIFT AID

As a result of the announcement in the 2007 Budget that the basic rate of income tax would be reduced by 2p in the pound from April 2008, charities faced an annual projected loss of some £100 million in reclaimed tax under the Gift Aid Scheme. As readers will be aware, the Treasury then began a consultation exercise on the operation of the Scheme; and that consultation continues. However, in the 2008 Budget, the Chancellor announced that charities would be given transitional relief at the old 22p rate until the end of financial year 2010–11, with the intention that they should use the breathing space to redouble their efforts to persuade supporters to sign Gift Aid declarations when making donations. This was duly included in the subsequent Finance Bill.

The Government's response to the Gift Aid consultation[19] was published at the same time as the Budget and announced a series of measures aimed at increasing take-up of Gift Aid over the longer term. Not surprisingly, all this was widely welcomed by the voluntary sector; however, concerns still remain about the complexity of the audit trail and record-keeping under the Scheme.

IMMIGRATION RULES AND MINISTERS OF RELIGION

As mentioned previously, in December 2007 the Home Secretary announced a new, Australian-style Points Based System (PBS) for highly skilled foreign workers from outside the European Economic Area applying to come to the United Kingdom.[20] The fine detail of the PBS is now beginning to emerge. At the beginning of May 2008, the UK Border Agency published its specific

19 Available at <http://www.hm-treasury.gov.uk/media/F/F/bud08_giftaid_335_.pdf>, accessed 19 May 2009.

20 Home Office Press Release, 6 December 2007.

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proposals for entry requirements for ministers of religion under Tier 2 of the Scheme[21] and for religious workers under Tier 5.[22] The bar on preaching and pastoral work for those admitted under Tier 5 remains – though it is still unclear precisely what constitutes 'pastoral work'. Might it include listening attentively and sympathetically while a fellow-member of the congregation pours out his or her troubles over coffee after Sunday morning worship?

The Government's draft legislative programme for Session 2008–09, which was announced on 14 May, included reference to a Citizenship, Immigration and Borders Bill, which, as well as providing a statutory framework for the UK Border Agency and setting out the eligibility requirements for UK citizenship, will consolidate and amend existing immigration law into a single statute. In his speech introducing the programme, the Prime Minister also made reference to proposals that immigrants 'will be required to pay into a migration impact fund to help local communities deal with changes in population'.[23] Where poorly paid religious workers who enter under Tier 5 will find the money to pay a levy remains to be seen.

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21 Available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/tier2/ministersofreligion/>, accessed 16 May 2008.

22 Available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/tier5temporaryworkers/religiousworkers/>, accessed 16 May 2008.

23 HC Deb (2007–08) 14 May c 1388.

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